Rashann Duvall
Regulatory Counsel

1320 North Court House Road,
9th Floor
Arlington, VA 22201
(703) 351-3179 (telephone)
(703) 351-3655 (facsimile)
E-mail: rashann.duvall@verizon.com

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**Ex Parte**

Marlene H. Dortch
Secretary
Federal Communications Commission
445 Twelfth Street, SW
Washington, D.C. 20554

***Re: Petition of Verizon New England Inc. for Forbearance Pursuant to 47 U.S.C. § 160(c) in Rhode Island (WC Docket No. 08-24); Petition of the Verizon Telephone Companies for Forbearance Pursuant to 47 U.S.C. § 160(c) in Cox's Service Territory in the Virginia Beach Metropolitan Statistical Area (WC Docket No. 08-49)***

Dear Ms. Dortch:

I am writing in response to several recent CLEC filings urging the Commission to adopt a new standard for analyzing petitions for forbearance from Section 251(c)(3) unbundling obligations.[1] As Verizon has previously explained and as set forth further below, there is no legal or factual basis for the Commission to adopt a new forbearance standard that further raises the bar for relief from unbundling regulation.

[1] Letter from Brad Mutschelknaus & Genevieve Morelli, Kelley Drye & Warren LLP (counsel for Broadview Networks, Covad, NuVox, and XO), to Marlene Dortch, FCC (Apr. 3, 2009) ("CLEC April 3 Letter"); Letter from Thomas Jones *et al.*, Willkie Farr & Gallagher LLP (counsel for One Communications, tw telecom, Integra Telecom, and Cbeyond), to Marlene Dortch, FCC (Apr. 14, 2009) ("CLEC April 14 Letter"); Letter from Brad Mutschelknaus & Genevieve Morelli, Kelley Drye &Warren LLP, to Marlene Dortch, FCC (Apr. 20, 2009) ("CLEC April 20 Letter").

## I. Verizon Has Demonstrated That It Satisfies the Existing Standard for Forbearance from Unbundling Regulation in Both Rhode Island and Cox's Service Territory in the Virginia Beach MSA; Recent Data Submitted by Cox Confirm This

The reason that the CLECs have proposed a new forbearance standard for the first time at the eleventh hour is clear: Verizon meets the standards that the Commission has applied in previous forbearance proceedings. Data that Cox recently submitted confirm this.[2]

First, in both Rhode Island and in Cox's service territory in the Virginia Beach MSA, Verizon meets the Commission's "coverage threshold test," which provides relief in every wire center where cable voice services could be made available, within a commercially reasonable time, to 75 percent of homes in the wire center. *See Omaha Forbearance Order*[3] ¶¶ 59-60. *Anchorage Forbearance Order*[4] ¶¶ 31-32. In both cases, Verizon provided evidence of Cox's public statements that Cox provides telephone services throughout its service territory in Rhode Island and the Virginia Beach MSA.[5] During the course of these proceedings, Cox never disputed the accuracy of any of its prior statements.[6]

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[2] *See* Letter from J.G. Harrington, Dow Lohnes PLLC (counsel to Cox Communications, Inc.), to Marlene Dortch, FCC, WC Docket No. 08-49 (Apr. 16, 2009), *corrected*, Letter from Jason Rademacher, Dow Lohnes PLLC, to Marlene Dortch, FCC, WC Docket No. 08-49 (Apr. 20, 2009) ("Cox Virginia Beach Data Submission"); Letter from J.G. Harrington, Dow Lohnes PLLC, to Marlene Dortch, FCC, WC Docket No. 08-24 (Apr. 21, 2009) ("Cox Rhode Island Data Submission").

[3] *Petition of Qwest Corporation for Forbearance Pursuant to 47 U.S.C. § 160(c) in the Omaha Metropolitan Statistical Area*, Memorandum Opinion and Order, 20 FCC Rcd 19415 (2005) ("*Omaha Forbearance Order*").

[4] *Petition of ACS of Anchorage, Inc. Pursuant to Section 10 of the Communications Act of 1934, as Amended, for Forbearance from Sections 251(c)(3) and 252(d)(1) in the Anchorage Study Area*, Memorandum Opinion and Order, 22 FCC Rcd 1958 (2007) ("*Anchorage Forbearance Order*").

[5] *See* Petition of Verizon New England for Forbearance, WC Docket No. 08-24, at 6-8 & Attach. B (Feb. 14, 2008) ("R.I. Pet'n"); Petition of the Verizon Telephone Companies for Forbearance, WC Docket No. 08-49, at 6-9 (Mar. 31, 2008) ("Virginia Beach Pet'n"); Declaration of Quintin Lew, John Wimsatt, and Patrick Garzillo Regarding Competition in Rhode Island at Exh. 3, R.I. Pet'n Attach. E ("R.I. Lew/Wimsatt/Garzillo Decl."); Declaration of Quintin Lew, John Wimsatt, and Patrick Garzillo Regarding Competition in Cox's Service Territory in the Virginia Beach Metropolitan Statistical Area at Exh. 3, Virginia Beach Pet'n Attach. C ("Virginia Beach Lew/Wimsatt/Garzillo Decl.").

[6] *See* Reply Comments of Verizon, WC Docket No. 08-24, at 3-4 ("R.I. Reply"); Reply Comments of Verizon, WC Docket No. 08-49, at 3-4 (June 10, 2008) ("Virginia Beach Reply").

Cox has recently filed data confirming that Cox provides ubiquitous coverage both in Rhode Island and in its service territory in the Virginia Beach MSA.[7] According to these data, of the 39 wire centers in Cox's service territory in the Virginia Beach MSA for which Verizon seeks relief,[8] Cox provides **[Begin Confidential]**

**[End Confidential]**[9] With respect to Rhode Island, Cox's data indicate that its provides **[Begin Confidential]**

**[End Confidential]**[10]

Second, Verizon also meets the share-of-residential-lines test the Commission applied in the *Six MSA Order*[11] in both Rhode Island and in Cox's service territory in the Virginia Beach

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[7] *See* Cox Virginia Beach Data Submission at 3; Cox Rhode Island Data Submission at 3. These data put to rest the CLECs' claim that "the limited cable facilities data Verizon has produced was filed with its petitions and is now more than a year old. Verizon has chosen not to update or supplement that data at any time since it was submitted." CLEC April 3 Letter at 18. This claim is ironic given that these same parties have repeatedly sought to exclude any evidence that is submitted after the original forbearance petition. In any event, Cox's data confirm what Verizon demonstrated at the time of its original petition – that Cox provided ubiquitous coverage throughout its service territory in the Virginia Beach MSA and in Rhode Island.

[8] **[Begin Confidential]**

**[End Confidential]** Cox also provides data for the Shipps Corner wire center (PRANVAXB), but there are no Verizon retail lines associated with that wire center.

[9] *See* Virginia Beach Reply, Exh. 1 (Verizon data as of December 2007/February 2008, including lines served by the former MCI); Letter from Nneka Ezenwa, Verizon, to Marlene Dortch, FCC, WC Docket Nos. 08-24 & 08-49, Attach. A at Exh. 6A (Virginia Beach) (Apr. 10, 2009) ("April 10, 2009 Ex Parte") (December 2008 Verizon retail lines by wire center, excluding lines served by the former MCI).

[10] *See* R.I. Reply, Exh. 1 (Verizon data as of December 2007/January 2008, including lines served by the former MCI); April 10, 2009 Ex Parte, Attach. A at Exh. 6A (Rhode Island) (December 2008 Verizon retail lines by wire center, excluding lines served by the former MCI).

[11] *Petitions of the Verizon Telephone Companies for Forbearance Pursuant to 47 U.S.C. § 160(c) in the Boston, New York, Philadelphia, Pittsburgh, Providence and Virginia Beach*

MSA. Indeed, in both cases, competitors' share of residential lines is approximately **[Begin Confidential] [End Confidential]** or more even when the analysis is limited to competition from Cox alone. *See* Attachment A.[12] And when cut-the-cord wireless subscribers are included, as they should be, in the competitive analysis, competitors' share of residential lines is even higher.[13] Moreover, this is true even if the Commission were to attribute Verizon Wireless cut-the-cord subscribers to Verizon, despite the fact that a loss of a Verizon wireline subscriber to Verizon Wireless is competitively equivalent to a loss to another competitive provider.[14]

Data submitted by Cox confirm that Verizon meets the share-of-residential-lines test both in Rhode Island and in Cox's service territory in the Virginia Beach MSA. In fact, with respect to Cox's service territory in the Virginia Beach MSA, Cox now serves **[Begin Confidential] [End Confidential]**. Using the data that Cox supplied, competitors' share of residential lines is approximately **[Begin Confidential] [End Confidential]** percent or more in the Virginia Beach MSA and approximately **[Begin Confidential] [End Confidential]** percent or more in Rhode Island.[15] *See* Attachment A. Cox's data are significant for another reason: they confirm Verizon's previous statements that a carrier's residential directory listings provide a reliable (if conservative) proxy for the number of residential lines that carrier serves.

Third, Verizon has demonstrated that it meets the Commission's forbearance standard with respect to enterprise customers. In Omaha, the Commission decided to forbear from loop

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*Metropolitan Statistical Areas*, Memorandum Opinion and Order, 22 FCC Rcd 21293 (2007) ("*Six MSA Order*").

[12] Cavalier argues that this is not the case, but it achieves that result by attributing non-UNE wholesale lines that CLECs serve to Verizon. *See* Letter from Brad Mutschelknaus & Genevieve Morelli, Kelley Drye & Warren LLP (counsel to Cavalier Telephone) to Marlene Dortch, FCC, WC Docket Nos. 08-24 & 08-49 (Apr. 24, 2009). As discussed above, under settled precedent, it is appropriate to treat non-UNE wholesale lines on the competitive side of the ledger. Under no reasonable approach, however, can these competitively served lines be attributed to Verizon.

[13] April 10, 2009 Ex Parte at 3, 5 & Attach. B; R.I. Pet'n at 13-14 & Attach. A; Virginia Beach Pet'n at 13 & Attach. B.

[14] R.I. Pet'n at 15-16; Virginia Beach Pet'n at 15.

[15] These calculations use the Centers for Disease Control and Prevention's (CDC) latest state-level estimates from 2007, adjusted for growth in cut-the-cord households since that time, which CDC has estimated to be approximately 5 percent. *See First-Ever State Estimates of Shift from Landlines to Cell Phones*, Associated Press (Mar. 11, 2009). Even without that 5 percent adjustment, however, competitors' share of residential lines is approximately **[Begin Confidential] [End Confidential]** percent or more in the Virginia Beach MSA and approximately **[Begin Confidential] [End Confidential]** percent or more in Rhode Island. *See* Attachment A.

and transport unbundling with respect to enterprise customers based on competition from Cox, the incumbent cable operator. *See Omaha Forbearance Order* ¶¶ 66-67. Verizon demonstrated that, in both Rhode Island and Cox's service territory in the Virginia Beach MSA, it satisfied each of the factors the Commission adopted to guide this inquiry.[16] Cox's recently submitted data provide further confirmation that each of these factors is met.

Cox's data show that in both the Virginia Beach MSA and in Rhode Island, Cox is serving a large and growing number of *business* lines using its own facilities. Cox's data indicate that it serves **[Begin Confidential] [End Confidential]** business lines in the Virginia Beach MSA and **[Begin Confidential] [End Confidential]** business lines in Rhode Island, which represents **[Begin Confidential] [End Confidential]** percent of the number of business lines that Verizon serves in Cox's service territory in the Virginia Beach MSA and Rhode Island, respectively.[17] Cox states its "last mile" is used **[Begin Confidential] [End Confidential]** of the time to provide the business lines it serves in both locations.[18] Cox's data demonstrate that it is using its own facilities to provide a full range of services to enterprise customers.[19]

Cox's data also disprove the CLECs' claim that the "FCC's reliance on cable companies' success in the mass market to predict future success in the business market is unreliable."[20] The CLECs claim that "cable companies have benefited from several advantages in the residential market that they do not benefit from in the business market," such as "legacy relationships," "economies of scope in the provision of IP voice services," and the ability to deploy facilities under a "protected (*de facto or de jure*) monopoly."[21] Even if these statements were accurate – and they are not – they are irrelevant here. Cox has demonstrated that, in addition to its enormous success serving residential customers, it has also achieved great success serving business customers. As shown above, Cox admits that its network is ubiquitous; that it offers all kinds of business services from standard business lines up to OCn services; and that it has won a

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[16] *See* R.I. Pet'n at 20-26; Virginia Beach Pet'n at 21-26.

[17] *See* Cox Virginia Beach Data Submission at 4; Cox Rhode Island Data Submission at 4; April 10, 2009 Ex Parte, Attach. A at Exhs. 6A & 7A.

[18] Cox Virginia Beach Data Submission at 4; Cox Rhode Island Data Submission at 4.

[19] *See* Cox Virginia Beach Data Submission at 4; Cox Rhode Island Data Submission at 4.. These data also disprove the CLECs' claim that Verizon does not meet the Commission's existing standards because "Verizon has not shown that Cox's last-mile facilities can be used to provide a full range of substitutable services to the requisite percentage of end user locations in each product and geographic market within a commercially reasonable period of time." CLEC April 3 Letter at 18.

[20] CLEC April 14 Letter, Attachment at 4.

[21] *Id*.

very significant share of business lines both in Rhode Island and in Cox's service territory in Virginia Beach.

The CLECs next argue that Verizon "attempts to justify forbearance on the purported existence of the 'extensive competitive facilities-based networks' deployed by non-cable competitors," but that "Verizon does not meet the requirement that it identify which, if any, of these fiber networks reach, and can support the offering of a full range of substitutable services within a commercially reasonable period of time, to individual customer locations."[22] But there is no such requirement. In Omaha, the Commission decided to forbear from loop and transport unbundling with respect to enterprise customers based on competition from Cox, the incumbent cable operator. *See Omaha Forbearance Order* ¶¶ 66-67. Verizon demonstrated that, in both Rhode Island and Cox's service territory in the Virginia Beach MSA, it satisfied each of the factors the Commission adopted to guide this inquiry.[23] The Commission has further held that its analysis of other types of competition for business customers, such as that provided by CLECs, is "incidental and supplemental to the Commission's determination" with respect to competition from cable. *Six MSA Order* ¶ 40 n.131. Verizon nonetheless demonstrated that other types of competition for business customers in Rhode Island and Virginia Beach – including from CLECs and alternative technologies such as fixed wireless – are more advanced than they were at the time of the Omaha decision.[24]

In light of all this, the CLECs' attempt to use data from GeoResults to demonstrate that "extremely few commercial locations are served by competitors using their own facilities" is irrelevant.[25] In prior proceedings where the Commission found that competition from cable "does not, without more, provide a sufficient basis for relief" the Commission also analyzed competition from other competitors that "have deployed their own extensive last-mile facilities for use in serving the enterprise market." *Qwest Four-MSA Order* ¶ 36. For example, the Commission has considered data from GeoResults regarding the number of CLEC-lit buildings in the areas for which forbearance is sought. *See, e.g., id.* ¶ 36 & n.135. There is no need to consider such data here, however, because competition from cable alone satisfies the Commission's forbearance tests.

Even if the Commission were to analyze the extent to which other competitors have deployed fiber, it should not rely solely on GeoResults data, but should instead request relevant data from competitors themselves.[26] As Verizon has previously explained, data from GeoResults

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[22] CLEC April 3 Letter at 18.

[23] *See* R.I. Pet'n at 20-26; Virginia Beach Pet'n at 21-26.

[24] *See* R.I. Pet'n at 20, 26-30; Virginia Beach Pet'n at 20, 26-31.

[25] CLEC April 3 Letter at 19.

[26] *See* Reply Comments of Covad Communications Group, NuVox Communications, and XO Communications, LLC at 11-16, WC Docket No. 08-24 (FCC filed May 12, 2008) ("R.I. Covad et al. Reply").

are incomplete and understate the extent of competitive facilities.[27] GeoResults does not receive complete data for all CLECs, and some CLECs do not appear to provide any data to GeoResults. For example, in Verizon's experience, GeoResults data typically exclude information from Cox and AT&T, which are two of the largest competitors in Rhode Island.

Moreover, the CLECs' discussion of the GeoResults data is misleading. According to the CLECs, GeoResults data indicate that there are 37,631 total commercial buildings in Rhode Island.[28] The CLECs claim that competitors serve only 249 of these buildings, and that these 249 buildings represent between 10-13 percent of "addressable demand."[29] But the universe of relevant buildings in Rhode Island is far smaller than 37,631. This is the total number of commercial buildings in the state, which includes everything from florists and dry cleaners to large multi-tenant office buildings. Many such locations do not generate significant demand for telecommunications services, and do not require the higher-capacity facilities, such as DS1 and DS3 loops, that are of concern to the CLECs here. Thus, the GeoResults data submitted by the CLECs also do not fairly represent the extent or significance of competitive fiber.

## II. There Is No Basis for the Commission To Adopt a New Forbearance Standard That Further Raises the Bar for Unbundling Relief

Unable to demonstrate that Verizon fails to meet the Commission's existing tests for forbearance from unbundling regulation, the CLECs argue that the Commission should adopt a new test, one that is clearly designed to ensure that such forbearance will rarely if ever be granted. But there is no basis in law or fact to adopt the standard that the CLECs propose, or, for that matter, any test that further raises the bar for unbundling relief.

### A. The Impairment Standard Precludes the Commission from Incorporating "Market Share" and "Multiple Competitor" Requirements in the Forbearance Standard, as the CLECs Propose

Insofar as Verizon has sought forbearance from unbundling obligations, the impairment standard – which Congress "made . . . the touchstone" of unbundling, *United States Telecom Ass'n v. FCC*, 290 F.3d 415, 425 (D.C. Cir. 2002) ("*USTA I*") – governs the Commission's analysis and limits any standard that it may apply. As the Supreme Court and the D.C. Circuit have repeatedly held, impairment turns upon "the *ability* of" competitors to provide service without UNEs, and not on whether one or more competitors has achieved any particular market share or the incumbent retains market power in a properly defined geographic and product market. 47 U.S.C. § 251(d)(1) (emphasis added); *see AT&T Corp. v. Iowa Utils. Bd.*, 525 U.S.

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[27] *See* Letter from Nneka Ezenwa, Verizon, to Marlene H. Dortch, FCC, WC Docket No. 08-24 (July 1, 2008), at 3 ("July 1, 2008 R.I. Ex Parte").

[28] *See* R.I. Covad et al. Reply at 12-13, Table 1.

[29] R.I. Covad et al. Reply at 12-15, Tables 1 & 2. The CLECs have not submitted GeoResults data with respect to Cox's service in the Virginia Beach MSA (or for that MSA as a whole).

366, 391-92 (1999). That is why the D.C. Circuit, applying the statutory standard and the Supreme Court's decision, has repeatedly held that impairment does not exist when "competition is *possible*" without UNEs, *e.g.*, *United States Telecom Ass'n v. FCC*, 359 F.3d 554, 575 (D.C. Cir. 2004) ("*USTA II*") (emphasis added). As the D.C. Circuit most recently summarized the state of the law, "[t]he fact that [competitors] can viably compete without UNEs" – *can*, not *are* – "*precludes* a finding that the [competitors] are impaired." *Covad Communications Co. v. FCC*, 450 F.3d 528, 534 (D.C. Cir. 2006) (emphasis added).

Therefore, the core of the impairment inquiry is whether there exists, with respect to a given network element, "structural impediments to competition" that are "linked (in some degree) to *natural monopoly*." *USTA II*, 359 F.3d at 572 (emphasis added); *accord USTA I*, 290 F.3d at 427. Absent such evidence that a network element has natural monopoly characteristics, the element is one that is "[]suitable for competitive supply" – therefore, there is no impairment as to that element because competition is possible without competitors obtaining that element from the incumbent as a UNE. *USTA I*, 290 F.3d at 427; *see also Illinois Bell Tel. Co. v. Box*, 548 F.3d 609, 609-10 (7th Cir. 2008) (explaining that unbundling was "Congress's solution [to the problem] of bottleneck facilities"). Applying this principle, the D.C. Circuit has held that, "where the element in question – though not literally ubiquitous – is significantly deployed on a competitive basis," no impairment exists. *USTA I*, 290 F.3d at 422. As the record shows, the elements in question here – loops and transport – have been "significantly deployed on a competitive basis" throughout Rhode Island and Virginia Beach, not only by Cox, but also by other wireline competitors and wireless companies. The loops and transport, therefore, are plainly *suitable* for competitive supply, and there is no impairment.

In previously denying forbearance from unbundling obligations to Verizon and to Qwest, the Commission has employed a market share test – and, in fact, an extreme market share test. The Commission, however, has made no attempt to square that test with the impairment standard or the court decisions making clear that the Commission can order unbundling only where there is impairment (and, moreover, only where the benefits of unbundling as a response to impairment exceed its costs). In fact, a market share test is flatly inconsistent with the impairment standard. That is because any standard that is based on actual competitive "success" conflicts with the impairment standard, which turns of whether competitors are "capable of" competing without UNEs. Nonetheless, as the record shows here, Verizon plainly meets the test the Commission applied in the *Six MSA Order* in both Virginia Beach and Rhode Island. *See* Part I, *supra*. Even aside from the fact that the impairment standard prohibits the Commission from applying a market share test, it would be arbitrary and capricious, to say the least, for the Commission to respond to evidence that an incumbent has satisfied its extreme market share test by moving the goalposts yet again, as the CLECs here have urged the Commission to do.

Nor could the Commission apply the market power analysis the Commission uses as part of its dominant carrier analysis, as that analysis is equally in conflict with the impairment standard. The question whether an incumbent has market power – the core question in the dominant carrier analysis – has nothing to do with the impairment standard, which turns on whether competition is possible without UNEs. Indeed, the Commission has already recognized this, expressly finding that "the impairment standard . . . is *different from* . . . the standard we use to assess a carrier's dominant or non-dominant status" and that the "purposes of a market power

analysis are *not* the purposes of section 251(d)(2)." *Triennial Review Order* ¶¶ 109, 246 n.738 (emphases added). That is because a "market power analysis would go to the question of whether an incumbent LEC could raise its retail prices unchecked," while the "impair[ment] analysis asks whether a new entrant can provide its services without the UNE." *Id.* ¶ 109. Using a "market power analysis," the Commission explained further, would "disregard[] the Act's other goals of encouraging the deployment of alternative facilities and new technologies and reducing regulation." *Id.* Because the unbundling obligation and the impairment standard are "aimed at . . . identifying new entrants' impairment" – and not at "eliminating an incumbent LEC's market power in any particular market" – "there may be circumstances where an incumbent LEC has market power with regard to a particular input, but competitors are not impaired without access to the element, so unbundling would not be appropriate and might discourage new entrants from building their own facilities." *Id.* ¶¶ 109, 110.

For these reasons, the Commission did not apply its dominant carrier analysis in deciding whether to forbear from UNE requirements in Anchorage or Omaha. *See, e.g.*, *Omaha Forbearance Order* ¶¶ 17, 63, 91 (applying the Commission's "dominance analysis" only with respect to Qwest's request for forbearance from dominant carrier regulation and not with respect to Qwest's request for forbearance from unbundling obligations or § 271 checklist obligations). Indeed, in the *Anchorage Forbearance Order*, the Commission expressly rejected claims that it should review ACS's request for "UNE forbearance relief" as if the Commission "were conducting a traditional dominant-carrier analysis," explaining that it did not use the dominant carrier analysis in granting Qwest UNE relief in Omaha and that "nothing in the language of section 10 leads us to depart from this precedent and undertake this aspect of dominant carrier analysis here." *Anchorage Forbearance Order* ¶ 12.

Even aside from the fact that the Commission could not provide a reasoned basis for rejecting these prior, correct decisions refusing to apply dominant carrier analysis in the context of unbundling, a reversal of course would conflict with the D.C. Circuit's express affirmance of the Commission's prior conclusions. The D.C. Circuit, rejecting claims that the Commission should have applied its dominant carrier precedent in addressing a petition for forbearance from unbundling obligations (there, from § 271 obligations), noted that, in the *Omaha Forbearance Order*, the Commission "did not invoke its 'traditional market power' analysis" when "addressing forbearance from §§ 251 and 271" and held that decisions "address[ing] dominant carrier regulation rather than unbundling requirements" are "not directly applicable" to a petition seeking forbearance from unbundling requirements. *EarthLink, Inc. v. FCC*, 462 F.3d 1, 9 (D.C. Cir. 2006).

In past orders, the Commission found that evidence of Cox's "own extensive facilities" deployment was "sufficient to grant Qwest forbearance" from UNE requirements. *Omaha Forbearance Order* ¶ 59. The CLECs, however, have proposed that the Commission require that *multiple* wireline competitors achieve a certain market share before the Commission grants forbearance from UNE requirements. Even aside from the fact that any market share test conflicts with the impairment standard, D.C. Circuit precedent makes clear that a multiple competitor test conflicts with that standard as well. In defending the *Line Sharing Order*, the Commission claimed that unbundling was required to "enable a wider array of competitors to enter the market" – namely, CLECs offering DSL services over ILEC facilities – and that it was

irrelevant to the impairment analysis that "consumers [could] obtain broadband services through alternative means, including cable, wireless, and satellite systems." FCC *Line Sharing* Br.[30] at 20, 26 (emphasis omitted). The D.C. Circuit expressly rejected the Commission's ruling and its reasoning, criticizing the Commission for its "naked disregard of the competitive context" – namely, for treating as irrelevant the fact that cable companies were already providing "intense facilities-based competition." *USTA I*, 290 F.3d at 428-29. In light of that intense competition from intermodal providers, particularly cable companies, the D.C. Circuit found that the Commission could not show that unbundling would "bring on a significant enhancement of competition"; therefore, "nothing in the Act . . . license[d] . . . the Commission" to mandate unbundling in order to assist CLECs in competing with the incumbents, cable companies, and other intermodal providers. *Id.*

In the *Triennial Review Order*,[31] the Commission refused CLEC entreaties to re-impose a line sharing UNE obligation. The CLECs sought review, complaining that unbundling was necessary to prevent a "duopoly." *E.g.*, CLEC *TRO* Br.[32] at 35. The D.C. Circuit upheld the Commission's decision, agreeing that "line sharing is not essential to maintain robust competition" in light of "substantial intermodal competition from cable companies." *USTA II*, 359 F.3d at 585. The D.C. Circuit also expressly rejected the CLECs' duopoly claims, finding that "intermodal competition," "particularly from cable companies," ensures that "vigorous competition" will remain "even if CLECs proved unable to compete" absent UNEs. *Id.* at 580.[33] As the Court explained, that is because the 1996 Act's goal "is not to provide the widest possible unbundling, or to guarantee competitors access to [incumbent] []LEC network elements at the lowest price that government may lawfully mandate." *Id.* at 576. Instead "its purpose is to stimulate competition – preferably genuine, facilities-based competition." *Id.* Or, as the Seventh Circuit recently put it, unbundling exists to "*enable* carriers . . . to compete," and not "to enable them to take an almost free ride on services that [an incumbent] has spent a lot of money to create." *Illinois Bell Tel. Co. v. Box*, 548 F.3d 607, 611 (7th Cir. 2008).

Finally, although the CLECs – in seeking to justify their proposed standard – make no mention of the impairment standard, the Commission must forbear from UNE requirements

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[30] Brief for Respondents, *United States Telecom Ass'n v. FCC*, No. 00-1012 et al. (D.C. Cir. Aug. 1, 2001) ("FCC *Line Sharing* Br.").

[31] *Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, Report and Order and Order on Remand and Further Notice of Proposed Rulemaking, 18 FCC Rcd 16978 (2003) ("*Triennial Review Order*" or "*TRO*").

[32] Opening Brief of CLEC Petitioners and Intervenors in Support, *United States Telecom Ass'n v. FCC*, No. 00-1012 et al. (D.C. Cir. Jan. 16, 2004) ("CLEC *TRO* Br.").

[33] Here, of course, the record shows that, even after forbearance, wireline competitors will remain able to compete with Verizon, cable companies, and wireless companies using a combination of self-provisioned facilities, third-party facilities, facilities obtained from incumbents at tariffed rates, commercially negotiated arrangements, and resale.

where, as here, there is no impairment. The Commission may grant forbearance from UNE rules even in the presence of impairment or without making a finding as to impairment – because § 10 is an "independent means of seeking" relief from regulatory obligations, *AT&T Corp. v. FCC*, 236 F.3d 729, 738 (D.C. Cir. 2001) – but the reverse is not true. The Commission cannot, in any context, mandate unbundling where there is no impairment, as the Supreme Court and D.C. Circuit have repeatedly held.

Moreover, a showing that competitors are not impaired without UNEs necessarily satisfies each of the § 10 criteria. Under the statute, the Commission "shall forbear" when those criteria are satisfied. 47 U.S.C. § 160(a). First, where competitors are capable of serving customers without UNEs, the resulting retail competition will ensure that the rates end users pay remain just and reasonable, as the Commission has properly found in prior forbearance proceedings. *See Omaha Forbearance Order* ¶ 63; *271 Broadband Forbearance Order*[34] ¶ 21. Second, where there is no impairment, perpetuating UNEs harms consumers – rather than "protect[ing]" them, 47 U.S.C. § 160(a)(2) – because it discourages investment in, and deployment of, innovative products and services. *See USTA II*, 359 F.3d at 576; *Fones4All Order*[35] ¶ 13. Third, forbearance from UNE requirements is in "the public interest," 47 U.S.C. § 160(a)(3), where there is no impairment, because it avoids the recognized high social and economic costs of unbundling. *See, e.g.*, *USTA I*, 290 F.3d at 429 (unbundling – far from being "an unqualified good" – "inflict[s]" significant costs "on the economy"). Removing those requirements also fosters facilities-based competition and thus "promote[s] competitive market conditions." 47 U.S.C. § 160(b); *see USTA II*, 359 F.3d at 576 (1996 Act's "purpose is to stimulate competition – preferably genuine, facilities-based competition").

In addition, when the Commission promulgated the current UNE rules, based on a record that closed in 2004, the Commission recognized – as it had in the past – that facilities-based competition would continue to develop that would justify eliminating unbundling obligations in particular areas and that the Commission needed a mechanism to address the effect of that emerging intermodal competition on its impairment findings. *See Triennial Review Remand Order*[36] ¶¶ 36, 39. In 1999, the Commission had elected to use a rulemaking to "reexamine the national list of UNEs in three years," so that it could take account of "rapid changes in

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[34] *Petition for Forbearance of the Verizon Telephone Companies Pursuant to 47 U.S.C. § 160(c)*, Memorandum Opinion and Order, 19 FCC Rcd 21496 (2004) ("*271 Broadband Forbearance Order*").

[35] *Fones4All Corp. Petition for Expedited Forbearance Under 47 U.S.C. § 160(c) and Section 1.53 from Application of Rule 51.319(d) to Competitive Local Exchange Carriers Using Unbundled Local Switching to Provide Single Line Residential Service to End Users Eligible for State or Federal Lifeline Service*, Memorandum Opinion and Order, 21 FCC Rcd 11125 (2006) ("*Fones4All Order*").

[36] *Unbundled Access to Network Elements; Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, Order on Remand, 20 FCC Rcd 2533 (2005) ("*Triennial Review Remand Order*" or "*TRRO*").

technology and competition." *Triennial Review Order* ¶ 23. In 2002, the Commission stated that it would instead use the biennial review process under § 11 to determine whether "documented market changes merit modifications in [its] rules." *Triennial Review Order* ¶ 710.

In the *Triennial Review Remand Order*, in contrast, the Commission selected forbearance proceedings as its mechanism for updating its rules to current marketplace conditions and it "encourag[ed]" incumbents to "seek forbearance from the application of [its] unbundling rules in specific geographic markets," noting that its "impairment analysis" had reached "unbundling conclusions based on th[e]" record before it at that time. *Triennial Review Remand Order* ¶ 39. As the Commission would later explain that decision, it "invited incumbent LECs to seek forbearance" from UNE rules, "[r]ather than initiating a number of separate proceedings to address, case-by-case, situations where the Commission's impairment findings did not perfectly match local market realities." *Anchorage Forbearance Order* ¶ 5. Having thus invited and encouraged incumbents to use the forbearance process to update the UNE rules to reflect new evidence that competitors are not impaired, the Commission cannot – for this reason as well – apply a standard unrelated to (let alone in conflict with) the impairment standard in assessing such forbearance petitions.

### B. The Commission Cannot Adopt a Standard That Ignores the Competitive Impact of Wireless

The CLECs' proposed standard also fails because it would permit consideration of only "wireline competitors," thus excluding the competitive impact of wireless from the analysis. Such an approach is directly contrary to settled precedent and ignores basic economic realities, including extensive evidence demonstrating that wireless acts as a competitive constraint on wireline service.

In the two most recent decisions regarding forbearance from unbundling regulations (as well as in a variety of other contexts, including recent merger orders and the 272 Sunset Orders), the Commission has taken what it has called a "conservative" approach to measuring the competitive effect of wireless in the mass-market. *272 Sunset Order*[37] ¶ 42. Rather than addressing whether all wireless services are part of the relevant product market, the Commission has counted only those households who have decided to use only wireless service, and who do not purchase any wireline telephone service.[38] Thus, the Commission has excluded the more

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[37] *Section 272(f)(1) Sunset of the BOC Separate Affiliate and Related Requirements*, Report and Order and Memorandum Opinion and Order, 22 FCC Rcd 16440 (2007) ("*272 Sunset Order*").

[38] *Petitions of Qwest Corporation for Forbearance Pursuant to 47 U.S.C. § 160(c) in the Denver, Minneapolis-St. Paul, Phoenix, and Seattle Metropolitan Statistical Areas*, 23 FCC Rcd 11729, ¶ 19 (2008) ("*Qwest Four-MSA Order*") ("we find that mobile wireless service should be included in the local services product market to the extent that it is used a complete substitute for all of a consumer's voice communications needs."); *see also Six MSA Order*, Appendix B; *272 Sunset Order* ¶ 41 (calculating market share for stand-alone long distance service "taking . . . wireline-wireless usage substitution into account," and relying on Yankee Group data for that

than 58 percent of households who purchase both wireless and wireline service, even though, as Verizon has demonstrated, there is substantial evidence that these consumers, too, view wireless as a substitute for wireline service and, indeed, use their wireless phone to make a very large and rapidly growing fraction of all their calls.[39]

As the Commission's past approach recognizes, there is no evidence to support the argument that *no* consumers find wireless to be a substitute for wireline. The Commission has determined that a conservative approximation of the extent to which wireless is a substitute for wireline is the percentage of consumers who have already cut the cord. As the Commission explained, although "mobile wireless service and wireline telephone services are not perfect substitutes" for all customers, these services are a substitute for at least some segment of consumers, so it would therefore "limit the inclusion of mobile wireless services in our competitive analysis" by including "such services only to the extent a household has elected to forgo wireline telephone service, rather than use mobile wireless services only as a complement to wireline telephony services." *Qwest Four-MSA Order* ¶ 20.[40] The Commission stated that this conservative "approach reasonably approximates the extent to which residential telephony customers view mobile wireless and wireline services as substitutes, and this is the approach most consistent with the Commission's precedent." *Id.*; *see also Verizon/MCI Order*[41] ¶ 91 ("Even if most segments of the mass market are unlikely to rely upon mobile wireless service in lieu of wireline local services today . . . our product market analysis only requires that there be evidence of sufficient substitution for significant segments of the mass market to consider it in our analysis.").

The Commission's approach is conservative not only because it ignores the impact of wireless usage substitution among customers who have not cut the cord, but also because the

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analysis); *272 Sunset Order* ¶ 42 (calculating market shares for bundled local and long distance services that included cut-the-cord wireless).

[39] *See* Stephen J. Blumberg & Julian V. Luke, Div. of Health Interview Statistics, Nat'l Ctr. for Health Statistics, CDC, *Wireless Substitution: Early Release of Estimates from the National Health Interview Survey, January-June 2008*, at 5, Table 1 (Dec. 17, 2008), http://www.cdc.gov/nchs/data/nhis/earlyrelease/wireless200812.pdf ("*CDC Wireless Substitution Survey*"); R.I. Lew/Wimsatt/Garzillo Decl. ¶¶ 26-27; Virginia Beach Lew/Wimsatt/Garzillo Decl. ¶¶ 25-26.

[40] *See also* Direct Testimony of Dr. Jeffrey A. Eisenach, Application of Verizon Virginia Inc. and Verizon South Inc. for a Determination that Retail Services Are Competitive and Deregulating and Detariffing of the Same, Case No. PUC-2007-00008, at 11-12 (Jan. 17, 2007) (explaining that particularly in markets for services characterized by product differentiation, products do not have to be perfect substitutes to be considered in the same market for purposes of competitive analysis under the *Merger Guidelines*).

[41] *Verizon Communications Inc. and MCI Inc., Applications for Approval of Transfer of Control*, Memorandum Opinion and Order, 20 FCC Rcd 18433 (2005) ("*Verizon/MCI Order*").

percentage of consumers who would be willing to cut the cord is likely even greater than the percentage of consumers who have already done so.[42] Indeed, as Verizon has shown, independent analysts expect the number of cut-the-cord subscribers to continue to increase over the next few years.[43] Moreover, in the forbearance context, the Commission's approach has been even more conservative, because it has excluded the cut-the-cord customers of the ILECs' own wireless affiliates, even though, as Verizon has demonstrated, ILEC wireless services provide the same competitive discipline as unaffiliated wireless services.[44]

The Commission's prior decisions to consider the competitive impact of wireless in the mass market, and to use cut-the-cord wireless as a proxy to measure this impact, were based on extensive factual records. First, the Commission has relied on increasing rates of wireline-to-wireless substitution.[45] Second, the Commission has relied on internal company documents indicating that wireless companies "consider[] this growing substitution in developing [their] marketing, research and development, and corporate strategies for [their] local service offerings."[46] Third, the Commission has relied on its determination in the *Sprint/Nextel Order* that Sprint/Nextel would "likely take actions that would increase intermodal competition between wireline and wireless services as well as Sprint's plans to focus its efforts on

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[42] *See 272 Sunset Order* ¶ 42 ("acknowledg[ing] the conceptual difficulties associated with estimating market shares for this bundled service market," but stating that limiting the analysis to households that have cut the cord is "a *conservative* approach, which, if anything, will again tend to overstate AT&T's and Verizon's respective market positions" with respect to bundled local and long distance services).

[43] *See* R.I. Lew/Wimsatt/Garzillo Decl. ¶ 25; Virginia Beach Lew/Wimsatt/Garzillo Decl. ¶ 24; *see also* S. Flannery et al., Morgan Stanley, *Broadband Outlook: 1Q Subscriber Growth "Less Bad," Pricing Watch On*, at 14, Exh. 29 (Apr. 17, 2009) (estimating cut-the-cord households at 19 percent at the end of 2008 and 26 percent at the end of 2010); J. Reif Cohen et al., Bank of America/Merrill Lynch, *Battle for the Bundle: Telcos Take Broadband Net Add Lead*, at 13, Chart 15 (Mar. 16, 2009) (estimating cut-the-cord households at 20 percent at the end of 2008 and 31 percent at the end of 2010).

[44] R.I. Pet'n at 15-16; Virginia Beach Pet'n at 15; April 10, 2009 Ex Parte at 3.

[45] *See Qwest Four-MSA Order* ¶ 19 ("Over the past several years, as wireless substitution rates have continued to rise, the Commission has begun including such intermodal substitution in its competitive analysis."); *id.* ¶ 19 n.71 (citing sources that provided wireline-to-wireless substitution data); *Verizon/MCI Order* ¶¶ 90-91; *see also SBC Communications Inc. and AT&T Corp.*, Applications for Approval of Transfer of Control, Memorandum Opinion and Order, 20 FCC Rcd 18290, ¶¶ 89-90 (2005) ("*SBC/AT&T Order*"); *AT&T Inc. and BellSouth Corporation, Application for Transfer of Control*, Memorandum Opinion and Order, 22 FCC Rcd 5662, ¶¶ 95-96 (2007) ("*AT&T/BellSouth Order*").

[46] *Verizon/MCI Order* ¶ 91 & n.272; *see also SBC/AT&T Order* ¶ 90 & n.271; *AT&T/BellSouth Order* ¶ 96 & n.279.

encouraging consumers to 'cut the cord.'" *Verizon/MCI Order* ¶ 91. Fourth, the Commission has relied on "increasing usage substitution" with respect to consumers who subscribe to both wireless and wireline service.[47] The Commission cited evidence "that customers are willing to shift usage to wireless . . . in response to changes in relative prices." *272 Sunset Order* ¶ 45.

As the Supreme Court recently held in the fleeting expletives case, when an agency adopts "new policy [that] rests upon factual findings that contradict those which underlay its prior policy" the agency "must" "provide a more detailed justification than what would suffice for a new policy created on a blank slate." *FCC v. Fox Television Stations, Inc.*, No. 07-52, slip op. at 11 (Apr. 28, 2009); *see also id.* at 3 (Kennedy, J., concurring) ("An agency cannot simply disregard contrary or inconvenient factual determinations that it made in the past, any more than it can ignore inconvenient facts when it writes on a blank slate."). Here, the evidence that wireless competes with wireline is *even stronger* than it has been in previous cases where the Commission found that wireless provided competitive discipline to wireline. First, the latest data show that at least 17.5 percent of households nationally have already cut the cord (as of the first half of 2008), compared to 6 to 15.8 percent at the time of the Commission's prior orders.[48] Second, wireless prices have continued to decline since the Commission's prior findings.[49] Third, the current economic crisis highlights consumers' increasing willingness to switch from wireline to wireless; one of the main reasons consumers switch is that they increasingly see the two services as interchangeable, and do not want to pay for both, particularly when finances are tight.[50] According to Nielson Research, the main reason households give up their landline

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[47] *272 Sunset Order* ¶¶ 41, 44; *see also Petition of Qwest Communications International Inc. for Forbearance from Enforcement of the Commission's Dominant Carrier Rules As They Apply After Section 272 Sunsets*, Memorandum Opinion and Order, 22 FCC Rcd 5207, ¶ 38 (2007) ("[T]he evidence in the record is consistent with the Commission's previous finding that customers are highly sensitive to changes in the price of wireline interstate, interLATA telecommunications services and that customers are willing to shift usage to wireless and over-the-top VoIP providers in response to changes in relative prices.").

[48] *See* Verizon April 10 Ex Parte, Attach. B; *Six MSA Order*, App. A, n.2; *Qwest Four-MSA Order* ¶ 21 n.76; *First-Ever State Estimates of Shift from Landlines to Cell Phones*, Associated Press (Mar. 11, 2009).

[49] *See, e.g.*, G. Lundberg, Communications Equity Research, LLC, *The Cell Cartel – U.S. Wireless Pricing Raises Questions*, at 8, Exh. 9 (Mar. 23, 2009) (showing declines since 2002 in voice price per minute for the four national wireless carriers). According to data from the Bureau of Labor Statistics, wireless prices as measured by the Consumer Price Index have declined nearly 40 percent in nominal terms since 1997.

[50] *See, e.g.*, M. Davis, IDC, *U.S. Service Provider Bundled Services 2008-2012 Forecast: Revenue Analysis*, at 6 (May 2008) ("Almost 60% of the consumers that IDC surveyed in its January 2008 *U.S. Service Provider Competition Survey* indicated the reason they dropped landline was the expense associated with keeping both landline and wireless phone subscriptions. . . . It is clear landline is the service that will be cancelled when consumers make a choice [] between the two services."); D. Barden et al., Bank of America/Merrill Lynch, *1Q09*

phones is "to save money…. [T]he average wireless substituting household saves $33 per month when moving to wireless only."[51] Fourth, wireless carriers have also stepped up their efforts to promote their service as a wireline alternative.[52] And in response, as the *New York Times* recently observed, "to keep customers from deserting their landlines, the traditional phone companies like AT&T and Verizon offer a slew of discounts."[53] Fifth, wireless usage has continued to grow rapidly, and the evidence shows that this has come at the expense of wireline usage.[54] Sixth, a long line of state commission cases from California to New York have concluded that wireless competes with wireline based on extensive analysis[55] – and the Virginia state legislature recently passed legislation to that effect.[56]

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*Telecom Results Heads Up & Model Book*, at 18 (Apr. 17, 2009) ("As the economy weakens, wireless substitution is increasing in our view because, unlike broadband or pay TV, fixed line voice is almost perfectly substitutable by wireless; there is little sacrifice for many consumers when they give up their landline.").

[51] See Nielsen Research, *Call My Cell: Wireless Substitution in the United States*, at 7 (September 2008). According to the Bureau of Labor Statistics, in October 2007, consumer expenditures on wireless telephone services were close to exceeding spending on wireline services for the first time. Bureau of Labor Statistics, *Spending on Cell Phone Services Rapidly Approaching That of Residential Phone Services*, (Oct. 26, 2007), available at http://www.bls.gov/cex/cellphones.htm.

[52] *See* Clear, *What Is Clear?*, https://www.clear.com/what_is_clear.php ("Clear gives you choices: Service for home, around town or both . . . Devices for mobile or at home use"). T-Mobile offers "T-Mobile @Home," a "$10-a-month home phone service for T-Mobile [wireless] customers. It's designed for those who want to keep their home phone but say goodbye to expensive home phone bills." T-Mobile, *T-Mobile @Home FAQs*, http://www.t-mobileathome.com/#/about-at-home/faqs.aspx. *See also* J. Armstrong et al., Goldman Sachs, *4Q2007 North America Telecom Services Review* (Mar. 2008) ("In recent weeks, all four national carriers have announced unlimited voice plans, which we believe will serve to increase the rate of wireline substitution going forward, especially in a cyclical spending pullback. Consumers have never had the variety of voice calling options that are available now as substitute products.").

[53] E. Taub, *Talk Is Cheap, If You Ask*, N.Y. Times (Apr. 30, 2009), attached as Attachment C.

[54] *See* S. Flannery et al., Morgan Stanley, *1Q09 Preview: Solid Quarter in Prospect Despite the Environment*, at 22 & Exh. 33 (Apr. 20, 2009) (noting "the explosion of wireless usage with increased MOUs and data traffic;" wireless MOUs for the four largest wireless carriers has increased by 20 percent in the last two years, from 1.9 trillion minutes in 2006 to 2.3 trillion minutes in 2008); T. Seitz et al., Lehman Brothers, *Is the Currency Uncertainty Turning?*, at 9, Figure 12 (Mar. 27, 2008) (wireless vs. wireline MOUs).

[55] *See, e.g. Order Instituting Rulemaking into the Review of the California High Cost Fund B Program*, Decision Adopting Phased Transition Plan for Pricing Basic Telephone Service,

None of the evidence submitted by the CLECs here provides a basis for overruling past precedent and ignoring wireless in the competitive analysis. Although the CLECs argue that Verizon should have the burden of performing a rigorous econometric analysis showing the cross-elasticity of demand between wireless and wireline,[57] given the Commission's prior findings and the extensive records on which those findings were based, it is the *CLECs* that must

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Rulemaking 06-06-028, Decision No. 08-09-042, at 42-43 (Cal. PUC Sept. 18, 2008) ("cross-platform competition, particularly from wireless and VoIP technologies, constrains the ability of an ILEC to raise basic rates."); Finding and Order, Application of Verizon North Inc. for Approval of an Alternative Form of Regulation of Basic Local Exchange Service and Other Tier 1 Services Pursuant to Chapter 4901:1-4, Ohio Administrative Code, Case No. 08-989-TP-BLS, ¶ 36 (Ohio PUC Mar. 18, 2009) (relying on wireless in holding that Verizon "is subject to competition" for basic local exchange services and that customers "have reasonably available alternatives"); *Board Investigation Regarding the Reclassification of Incumbent Local Exchange Carrier (ILEC) Services As Competitive*, Order, Docket No. TX07110873, at 50 (N.J. BPU Aug. 20, 2008) ("The evidence overwhelmingly shows that competitors offer substitutes to the ILECs' voice services. CLEC, cable, VOIP, and wireless providers all offer either stand alone and/or packages of services that consumers may, and do, purchase to replace ILEC services."); *Possible Extension of Board Jurisdiction over Single Line Flat-Rated Residential and Business Rates for Local Exchange Carriers*, Final Order, Docket No. INU-08-1, at 10 (Iowa Utils. Bd. June 27, 2008) ("the Board finds that the current level of wireless competition in Iowa is a sufficient market force at this time to help discipline wireline prices and ensure reasonable service quality for many customers."); *Application of Verizon Virginia Inc. and Verizon South Inc. for a Determination that Retail Services Are Competitive and Deregulating and Detariffing of the Same*, Order on Application, Case No. PUC-2007-00008, at 22 (Dec. 14, 2007) (holding that given that "wireless service is an adequate substitute for *some* customers, and this number is growing" "it would underestimate the actual amount of competition to Verizon if we did not include wireless competition at all in determining market competitiveness."); Statement of Policy on Further Steps Toward Competition in the Intermodal Telecommunications Market and Order Allowing Rate Filings, Case 05-C-0616, at 54 (Apr. 11, 2006) (holding that competitive alternatives including wireless are "constraining incumbent prices and indeed are forcing incumbent prices down.").

[56] H. 1885 (approved Apr. 8, 2009) requires the Virginia State Corporation Commission, when determining whether the telephone services of a telephone company are competitive, to consider "all wireless communications providers that offer voice communications services to be facilities-based competitors owning wireline network facilities and reasonably meeting the needs of consumers." Va. Code § 56-235.5.

[57] *See* Declaration of Dr. Michael D. Pelcovits at 8-9 ("Pelcovits Decl."), *attached to* Letter from Samuel Feder, Jenner & Block LLP, to Marlene Dortch, FCC, WC Docket Nos. 08-24 & 08-49 (Apr. 21, 2009).

prove that the Commission's prior findings are wrong.[58] While the CLECs cite several sources in an attempt to make such a case, none comes close to providing a basis to exclude wireless *entirely* from the competitive analysis, as they seek to do. To the contrary, and as shown below, each concludes that there is extensive wireless-wireline substitution.

As an initial matter, the CLECs ignore one recent study that is directly contrary to their claims. In December 2008, Dr. William Taylor and Dr. Harold Ware released a report (attached here) finding that "data on price trends and substitution of wireless for landline services show that mobile services currently represent an effective competitive constraint on landline access pricing."[59] The study found that "changes in price and demand from 2001 to 2007 imply that wireless is a substitute for wireline service rather than a complement" and that, during this time the "price of wireless service relative to wireline service declined by about 12%." The study further calculated the "cross-price elasticity" between wireless and wireline, which it found to be "about 1.4." The study further analyzed the competitive impact of wireless as compared to cable, and found that wireless "is at least as potent of a competitor to as cable telephone service."

None of the studies that the CLECs cite address the efficacy of the Commission's conservative approach to evaluating wireless competition, which, as discussed above, considers only cut-the-cord customers without asking the broader question of whether wireless should be considered in the same market as wireline. The studies the CLECs cite address only this broader question, and even on that score none of them directly addresses the question. None, except for the Taylor/Ware study, actually measure the price-cross elasticity between wireless and wireline. In addition, each of the studies on which the CLECs rely suffer from multiple additional shortcomings.

The CLECs first cite a report that the Department of Justice released in November 2008.[60] This report was not intended as a comprehensive study, but instead presents the results of a symposium that the DOJ held. Based on that symposium, the report concludes that there is "substantial information . . . to demonstrate that substitution from landline to mobile telecommunications services is having a noticeable effect on the number and usage or residential lines served by incumbent landline carriers." *November 2008 DOJ Study* at 61. DOJ states that, under the formal analysis specified by the Horizontal Merger Guidelines, the key to determining the "size of the wireless substitution effect" is determining "the number of customers who would

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[58] *See Public Serv. Comm'n of State of N.Y. v. FERC*, 813 F.2d 448, 451 (D.C. Cir. 1987); *accord Columbia Gas Transmission Corp. v. FERC*, 628 F.2d 578, 586 n.31 (D.C. Cir. 1979).

[59] *See* William E. Taylor and Harold Ware, NERA Economic Consulting, *The Effectiveness of Mobile Wireless Service As a Competitive Constraint on Landline Pricing: Was the DOJ Wrong?* (Dec. 11, 2008), http://www.nera.com/image/PUB_DOJ_Effectiveness_Wireless_Service_0109_FINAL.pdf ("*Taylor/Ware Report*"), attached as Attachment B.

[60] U.S. Dep't of Justice, *Voice, Video and Broadband: The Changing Competitive Landscape and Its Impact on Consumers* (Nov. 2008), http://www.usdoj.gov/atr/public/reports/239284.pdf ("*November 2008 DOJ Study*"); CLEC April 20 Letter at 2-3.

choose to substitute to wireless service entirely in response to a specified price increase for landline telephone service, compared with the number of customers who would choose to stay with landline and pay the additional price." *Id.* at 65. DOJ concludes, however, that this information "is not known." *Id.*

The DOJ purports to compare wireless and wireline prices, but its analysis is incomplete. The DOJ simply compared wireless prices with prices for landline local telephone service, and found that, despite the rise in wireless usage, "*stand-alone landline access prices* have remained relatively stable and do not appear to have declined substantially below the levels at which they are capped by regulation." *November 2008 DOJ Study* at 66 (citing FCC monthly prices for residential access lines) (emphasis added).[61] The DOJ did not analyze prices for bundled local and long-distance service, even though that is how a large and rapidly growing percentage of wireline customers purchase local service today.[62] The DOJ thus failed to impute to local wireline prices some component of the discount that carriers typically build into their bundled service offerings.[63] The DOJ also did not account for the fact that local telephone prices historically have been set at artificially low levels by state regulators.

The DOJ study further claims that the "most significant[]" evidence with respect to wireless-wireline substitution is the testimony of Dr. Simon Wilkie who "observed that econometric analyses of the issues have not shown that wireless and landline telephone services are in the same product market, though they may be getting close." But the Commission has already addressed the issues raised by Dr. Wilkie.[64] Dr. Wilkie did not perform his own econometric analysis of wireless and wireline prices, but instead relied primarily on dated "econometric analyses" (by Ward, Woroch, and Rodini) that the Commission has previously

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[61] The DOJ's analysis also is problematic in two additional respects. First, it relies on data regarding wireline rates from 2000 to 2007 – *before* the great acceleration of wireless substitution that has occurred in the past two years. Second, it fails to account for the fact that residential local rates are artificially low to begin with (particularly when viewed on a nationwide average basis as DOJ did here), due to subsidies that regulators have built into wireline rate structures.

[62] *See Verizon/MCI Order* ¶ 96; *272 Sunset Order* ¶ 26. *See also* Harold Ware, "Can Competition Regulate Rates for Basic Telephone Services?" *Presentation to International Telecommunications Society Conference* at 7 (June 2008) (estimating that only about 10 percent of all wireline customers purchase local service only, with 90 percent purchasing some combination of local, long distance and enhanced services).

[63] *See Taylor/Ware Report* at 3 & Table 1.

[64] *See, e.g., Verizon/MCI Order* ¶ 105 n.318 (rejecting CLEC-sponsored declaration of economist Simon Wilkie that claimed the merger would result in "likely price increases for residential long distance and bundled services." The Commission found the analysis "flawed because [it] does not consider competition from intermodal competitors.").

rejected on numerous grounds.[65] In the *Qwest Four-MSA Order*, when the CLECs submitted a paper (by Kent Mikkelsen) discussing these same sources, the Commission found that "we are not persuaded by the purportedly analogous evidence the Mikkelsen White Paper offers in support of completely excluding mobile wireless services from the relevant product market, including a paper by Rodini, Ward, and Woroch." *Qwest Four-MSA Order* ¶ 20 n.73. The Commission found three critical flaws with this paper – (1) its "focus was on a household's decision to subscribe to mobile wireless service in lieu of a *second* fixed line; (2) "its data were not rich enough to estimate the cross-elastic effect from wireless price changes on the decision to subscribe to any fixed line," and (3) the paper "provide[s] little evidence of current conditions because that study relied on 2000-2001 data and fewer than 2 percent of the sample participants had 'cut the cord'" at that point in time. *Id.* Thus, the only recent econometric analysis of wireless and wireline prices is the Taylor/Ware study, which, as noted above, found that wireless services act as an effective competitive constraint on wireline pricing.

The CLECs next rely on a March 2009 study by Dr. Trevor Roycroft, which was prepared on behalf of The Utility Reform Network ("TURN"). Dr. Roycroft purported to study the effect of retail rate deregulation in California. Dr. Roycroft does not conduct an econometric analysis of any kind; he merely concludes that wireless does not constrain wireline prices given his observation that, in the wake of deregulation, ILECs raised their basic local rates. Like the *November 2008 DOJ Study*, however, Dr. Roycroft analyzed rates only for stand-alone basic local service, and ignored the discounts that carriers typically build into the bundled service offerings that many consumers now purchase. In addition, Dr. Roycroft fails to account for the fact that basic local service rates in California have been held artificially low by regulation for more than a decade, during which time traditional sources of subsidy for such services (such as long distance toll revenue and high-cost universal service support) have eroded substantially. As a result, some small increases to basic service rates are to be expected, and do not provide evidence of market power. Although Verizon increased its basic service rate by $2.25 (or 12.7 percent), this was the first major increase in 14 years, since January 1, 1995, and was substantially below the $3.25 increase that the CPUC authorized. Even with this increase, Verizon California's stand-alone basic rate is lower (in real terms) today than it was in 1995.[66]

Unable to muster additional evidence with respect to the United States, the CLECs cite a March 2009 study by Ofcom that considers "the state of competition in the retail narrowband

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[65] *See November 2008 DOJ Study* at 66 n.364 (citing Wilkie's reliance on these studies).

[66] Today's basic service rate of $19.91 is equivalent to $14.10 in 1995, taking into account the 41 percent inflation that has occurred over the past 14 years. *See* Bureau of Labor Statistics, Consumer Price Index, All Urban Consumers (Jan. 1995 = 150.3; Feb. 2009 = 212.193). This is 18 percent lower than the $17.25 rate that prevailed in 1995. *See Alternative Regulatory Frameworks for Local Exchange Carriers and Related Matters*, Decision, D.94-09-065 (Cal. PUC Sept. 15, 1994).

telephony markets" in the United Kingdom.[67] But this study is of little (if any) relevance given the significant differences between the U.S and the U.K. with respect to wireless-wireline competition. For example, the U.K. has different regulation of local wireline phone service and a different rate structure.[68] U.K. wireless rates (which rely on a calling party pays model) also differ in structure from those in the U.S. (which relies on mobile party pays). In addition, the rate of wireless substitution in the U.K. is considerably lower than in the U.S. – 11 percent according to Ofcom,[69] as compared to 17.5 percent according to the CDC's estimate for first half of 2008. Moreover, the U.K. has a much higher percentage of pre-paid wireless subscribers,[70] which Ofcom found view wireless as more expensive relative to wireline than monthly contract subscribers.[71] Further, Ofcom's report is based not on any econometric analysis, but instead on consumer surveys, and there is no basis to believe that the preferences and habits of U.K. consumers are comparable to those in the U.S.

In any event, nothing in the Ofcom report supports excluding wireless *entirely* from the competitive analysis, as the CLECs propose. To the contrary, Ofcom's survey of consumers found that the "main reason" why mobile-only customers chose not to have a landline is that a landline is "too expensive," which "suggests that there is likely to be some substitution between fixed and mobile access." *Id.* § 4.28. Ofcom's consumer market research likewise indicated that a full *third* of customers would "drop their landline if the mobile phone was cheaper," which Ofcom found to "suggest that a proportion of consumers do regard their mobile phone and their landline as substitutes and would be prepared to drop the landline if the relative price difference decreased. *Id.* § 4.32.

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[67] Office of Communications, U.K. (Ofcom), *Fixed Narrowband Retail Services Markets*, § 1.1 (Mar. 19, 2009), http://www.ofcom.org.uk/consult/condocs/retail_markets/fnrsm.pdf ("*Ofcom Study*"); *see* CLEC April 20 Letter at 4-5.

[68] *Compare*, *e.g.*, *Ofcom Study* at 47, Table 5.5 (£15.12, or approximately $22, for "line rental + unlimited anytime calls to UK landlines"), *with* Ind. Anal. & Tech. Div., Wireline Competition Bureau, FCC, *Reference Book of Rates, Price Indices, and Household Expenditures for Telephone Service*, at Table1.1 & I-4 (2008) ($25.62 average monthly charge for flat-rate local service, excluding intraLATA and interLATA calling; example of $42.99 plan that includes unlimited long-distance).

[69] Ofcom, *The Communications Market 2008*, at 296, Figure 5.4 (Aug. 2008), available at http://www.ofcom.org.uk/research/cm/cmr08/ ("*Ofcom Communications Market Report*").

[70] *Compare Ofcom Communications Market Report* at 320, Figure 5.40 (64 percent of wireless subscribers in 2007 were pre-paid) *with* J. Atkin et al., RBC Capital Markets, *U.S. Wireless Review*, at 8, Exh. 2 (Mar. 9, 2009) (13 percent of U.S. wireless subscribers at YE08 were prepaid).

[71] *See Ofcom Study* § 4.60 (finding that wireless consumers with monthly contracts "are more likely to consider a mobile call as an effective substitute for a landline call than pay as you go customers.").

Ofcom further found that calls and access are "separate markets," and that "there is now a single residential narrowband calls market (including geographic, fixed to mobile, international and other calls)." *Id.* § 4.40. Ofcom looked at "actual consumer behavior" and found that consumers are "both making more calls, and choosing to make a higher proportion of those calls on mobile phones." *Id.* § 4.65. Ofcom further determined that "in general mobile and fixed calls are substitutable for each other" and that "customers will respond to an increase in the relative price of landline calls by making more mobile calls." *Id.* §§ 4.53, 4.64. Ofcom concluded that, "[o]verall, the results of our survey suggest that mobile and landline calls are increasingly seen by consumers as substitutes." Although Ofcom also found that "whether the extent of substitution is sufficiently strong to prevent a hypothetical monopoly supplier of fixed calls from raising prices by 5-10% above the competitive level is much less clear," it did not find any dispositive evidence that wireless calls prices did *not* constrain wireline call prices. *Id.* § 4.64. It noted, however, that "[t]he decline in the gap between both marginal and average mobile and fixed prices of itself suggests that there is increasing fixed-mobile substitution." *Id.* § 4.71.[72]

Finally, the CLECs submitted a declaration from Dr. Michael Pelcovits, but this likewise fails to provide any support for excluding wireless from the competitive analysis. Dr. Pelcovits relies primarily on "porting activity" to justify his conclusion that there is "little diversion from wireline to wireless." He states that "27,000 numbers have been ported between wireline and wireless carriers in Virginia," and 2.2 million nationwide, which he claims "is a very small percentage of the 20 million households that have cut the cord in the last several years." Pelcovits Decl. at 10. These data do not prove the absence of a substitution effect; if anything, they prove the opposite. The fact that few cut-the-cord households may choose to port their wireline number merely reflects the fact that the vast majority of households who cut the cord at one time had *both* a wireline and wireless phone – as is the case with the vast majority of all U.S. households today. For example, an IDC survey found that only 18 percent of respondents who did not have a landline had never owned a landline.[73] When households with both wireline and wireless decide to cut the cord, they typically do not port their wireline number, because that would entail getting rid of their existing wireless number. The fact that consumers choose not to do this reflects the fact that a large percentage of consumers view their wireless as their primary phone.[74] In general, porting from wireline to wireless would principally occur only in cases

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[72] Ofcom looked only at prices "between 2002 and 2007" and therefore did not consider changes in pricing that may have occurred in the past two years while wireless substitution greatly increased.

[73] *See, e.g.*, I. Berlinsky, IDC, *Why, When, and Who Cuts the Cord: IDC's 2008 Landline Displacement Survey Data*, at 1 (June 2008). *See also* J. Eisenach, *Competition and Potential Competition for Retail Telecommunications Services in Verizon's Virginia Beach-Norfolk-Newport News MSA Service Territory*, Case No. PUC 2007-0008, at 7 (Jan. 17, 2007) (reporting similar data for Virginia Beach MSA).

[74] *See, e.g.*, *CDC Wireless Substitution Survey* at 3 ("Among households with both landline and cellular telephones, 22.7% received all or almost all calls on the cellular telephones. These wireless-mostly households make up 13.3% of all households.").

where a household with no wireless phone purchases such phone for the first time at the same time they decide to give up their landline.[75]

In sum, there is overwhelming evidence and authority demonstrating that wireless and wireline compete, and that such competition should be taken into account in the Commission's forbearance analysis. None of the studies on which the CLECs rely prove otherwise.

### C. The Commission Should Continue To Include Non-UNE Wholesale Services in its Competitive Analysis

The CLECs argue that the Commission should exclude ILECs' non-UNE wholesale alternatives from the competitive analysis.[76] They claim that "resellers have essentially no ability to innovate by offering new services," whereas "UNE-based competitors can combine incumbent LEC loop or transport facilities with their own electronics."[77] But the CLECs neither offer a single example of a "new" service that has been offered by a UNE-based competitor, nor address the fact that Wholesale Advantage and special access gives CLECs these same supposed capabilities.

The CLECs also argue that the Commission should ignore evidence that Cox provides wholesale services in Rhode Island and Virginia Beach.[78] As an initial matter, there is no requirement under precedent or economic theory that vertically integrated competitors must make their facilities available on a wholesale basis. The fact that Cox is doing so only provides further proof that there is extensive competition in the areas at issue. In any case, the CLECs' claims are entitled to no weight. Russell Oliver, the Executive Vice President of One Communications, concedes that "Cox does apparently offer other types of high capacity loops to wholesale customers," but claims that "Cox has not demonstrated an interested in providing such

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[75] Dr. Pelcovits also argues that wireless broadband service does not constrain broadband wireline service, but this is irrelevant. The Commission has recognized that Internet access is sold in a separate market from voice service, and that there are multiple competitive alternatives for that separate product. *See, e.g., Appropriate Framework for Broadband Access to the Internet over Wireline Facilities*, Report and Order and Notice of Proposed Rulemaking, 20 FCC Rcd 14853, ¶¶ 3, 47-59 (2005); *Omaha Forbearance Order* ¶ 30. The Commission has further determined that competitors are not impaired in their ability to provide broadband services, and the D.C Circuit upheld that determination. *See USTA II*, 359 F.3d at 585. There is accordingly no basis to Dr. Pelcovits's concern that competitors be permitted to use unbundled loops to provide both broadband and voice services. *See* Pelcovits Decl. at 19 n.27.

[76] *See* CLEC April 3 Letter at 4-6, 9 n.27; CLEC April 14 Letter at 6-9.

[77] CLEC April 14 Letter at 8.

[78] *See* R.I. Pet'n at 25-26; Virginia Beach Pet'n at 25-26.

loops to One Communications."[79] But Mr. Oliver's own testimony suggests that it is One who chooses not to deal with Cox, both because One prefers to rely on a single wholesale provider,[80] and because One believes that "Cox's prices for DS1 or DS3 facilities are not low enough for Cox to be a viable alternative to the incumbent LEC as a provider of wholesale loops to One Communications."[81] This self-serving testimony merely proves that the Commission's unbundling requirements are deterring facilities-based competition, by encouraging competitive carriers to rely on artificially low UNE rates rather than market-based alternatives that are being offered by competing carriers.

## III. The Commission Should Reject the CLECs' Argument That Requests for Forbearance Should Be Considered Only for an MSA-Based Geographic Market

Although CLECs have long argued for exceedingly narrow geographic markets and that MSAs are too broad,[82] they reverse course here and argue that the Commission should consider forbearance for larger geographic markets than Verizon requests. But the geographic scope of Verizon's petitions are consistent with the Act and Commission precedent. The Telecommunications Act of 1996 provides that forbearance from applying any regulation to a telecommunications carrier should be determined with respect to "any or some of its or their geographic markets." 47 U.S.C. § 160(a). Given that the Commission invited incumbent LECs to file for forbearance with respect to unbundling regulation, Verizon has flexibility to determine the geographic areas for which it may seek relief. Here, in light of the Commission's determination in prior orders that forbearance is appropriate only in those areas where cable voice services are widely available, Verizon requested relief only in those areas in which Cox is the incumbent cable operator. *See Omaha Forbearance Order* ¶¶ 28, 69. Verizon explained that the areas for which Verizon seeks relief are smaller than the MSAs of which those areas are a part, which obviates any potential concerns that Verizon might obtain relief for a broader geographic area than the area subject to competition from cable.

The CLECs claim that "[t]he MSA is the most appropriate geographic market because it most accurately reflects the area in which purchasers of Section 251(c)(3) UNEs demand

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[79] Declaration of Russell Oliver on Behalf of One Communications Corp. ¶ 11 ("Oliver Decl."), *attached to* CLEC April 14 Letter.

[80] Oliver Decl. ¶ 10 ("One Communications cannot efficiently rely on multiple wholesale loop providers in a geographic area for loops that One Communications primarily utilizes (i.e., DS0 loops and conditioned copper loops).").

[81] *Id.* ¶ 11.

[82] *See* R.I. Reply at 22-23; Virginia Beach Reply at 29-30. The CLECs' attempt to distance themselves from their prior arguments is disingenuous. They claim that "they have reassessed their position in light of the need for competitors to achieve minimum viable scale in order to enter a geographic area." But that was the basis on which they rejected an MSA

service."[83] But the ultimate question in this proceeding is whether *consumers* – not other competitors – face higher prices or restricted output. In any event, the geographic markets for which Verizon has sought relief do not differ substantially in size from the MSAs of which they are a part, and the CLECs fail to demonstrate that the discrepancy is meaningful to their ability to compete.

Sincerely,

/s/

Rashann Duvall

Attachments

cc:

Scott Deutchmann, Legal Advisor to Acting Chairman Copps
Nick Alexander, Legal Advisor to Commissioner McDowell
Mark Stone, Legal Advisor to Commissioner Adelstein
Julie Veach, Acting Chief, Wireline Competition Bureau

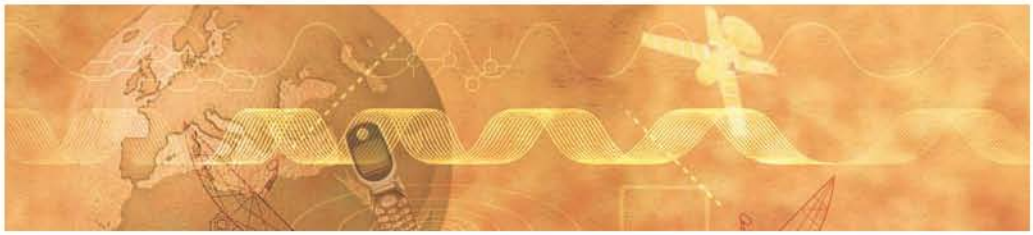
[83] CLEC April 3, 2009 Letter at 9.

REDACTED – FOR PUBLIC INSPECTION

11 December 2008

# The Effectiveness of Mobile Wireless Service as a Competitive Constraint on Landline Pricing: Was the DOJ Wrong?

**William E. Taylor and Harold Ware**[1]



The US Department of Justice (DOJ) recently concluded that "the available evidence does not establish that mobile services currently represent an effective competitive constraint on landline access pricing."[2] We disagree: data on price trends and substitution of wireless for landline services show that mobile services currently represent an effective competitive constraint on landline access pricing.

First, as shown in Figure 1, the relative price level of wireless compared to wireline service—i.e., the ratio of the wireless Consumer Price Index (CPI) to the wireline telephone CPI—fell dramatically (by about 30%) from 1998 to 2001.[3] By increasing the proportion of wireline customers for whom wireless was a comparably-priced substitute, this decline brought wireless into more direct competition with wireline service. Indeed, as the FCC noted, "a significant number of households began to have wireless service" instead of wireline service in 2001.[4]

[1] Dr. Taylor is a Senior Vice President at NERA. Dr. Ware is a Vice President at NERA. This note is based on a presentation by Dr. Ware at the June 2008 International Telecommunications Society conference in Montreal, Canada, and on testimony by Dr. Taylor on behalf of Verizon Virginia.

[2] US Department of Justice, *Voice, Video and Broadband: The Changing Competitive Landscape and Its Impact on Consumers* (the *DOJ Report*), November 2008 at 88.

[3] Derived from Bureau of Labor Statistics CPI Data.

[4] See FCC Trends in Telephone Service, February 2007, Table 7.4, footnote 1.

**Figure 1: Wireless Prices Have Decreased Relative to Landline Prices**


Second, although the *DOJ Report* [at 88] states that "relatively stable" landline prices are consistent with the DOJ's view that wireless services do not constrain wireline prices, the appropriate competitive analysis asks whether landline prices held above competitive market levels are affected by wireless service prices and demand, not necessarily what happens at current landline access prices. This point is relevant because, as the *DOJ Report* reminds us [at 34], "(l)ocal telephone services traditionally have been subject to regulation to achieve public policy goals (such as ensuring that service is universally available at reasonable prices)." Thus, there is little reason to believe that current wireline access prices represent competitive market prices, or to believe that competition from wireless would necessarily lower basic landline prices.

Third, as a result of the price changes summarized above and as shown in Table 1, wireless charges are comparable to average monthly charges paid by local exchange company (LEC) á la carte customers.

- Most (about 75%) of residential landline "basic-service customers" purchase a "synthetic package" of local and long distance services for about $36 per line per month.[5]
- Customers with wireless service can simply drop their landline if their wireless plan has enough usage. Others can upgrade their wireless plans to ones with larger usage or family share plans so that they can drop their landlines. The incremental charges for adding more minutes and/or additional phones for current wireless customers are only about $10 to $30 per month, depending on their carrier and the plan needed.
- For customers who buy only landline basic services, the least expensive wireless service options—increasingly prepaid wireless—provide viable, comparably-priced substitutes for low usage customers.
- The $30 mobile wireless options are viable alternatives to basic services (which cost about $21) because they include toll calling and valuable vertical features such as voice mail, call waiting, caller ID, and others. And, of course, mobile service is worth more because you can "take it with you."

**Table 1: Charges for Landline and Mobile Wireless**

| Service | Monthly Charge* |
|---|---|
| Á La Carte Charges for Landline Service | |
| "Synthetic Bundle" of Local & Long Distance Services | $36 |
| Basic Flat Rate Service Only | $21 |
| Upgrade Existing Mobile Wireless Plan | |
| Add Minutes to Existing Plan | $10 - $20 |
| Add Minutes & Phone to Family Plan | $20 - $30 |
| Convert to Family Plan & Add Minutes | $30 |
| Subscribe to New Mobile Wireless Plan | |
| 0 – 130 Anytime Minutes | $10 - $25 |
| 200 – 400 Anytime Minutes | $30 |

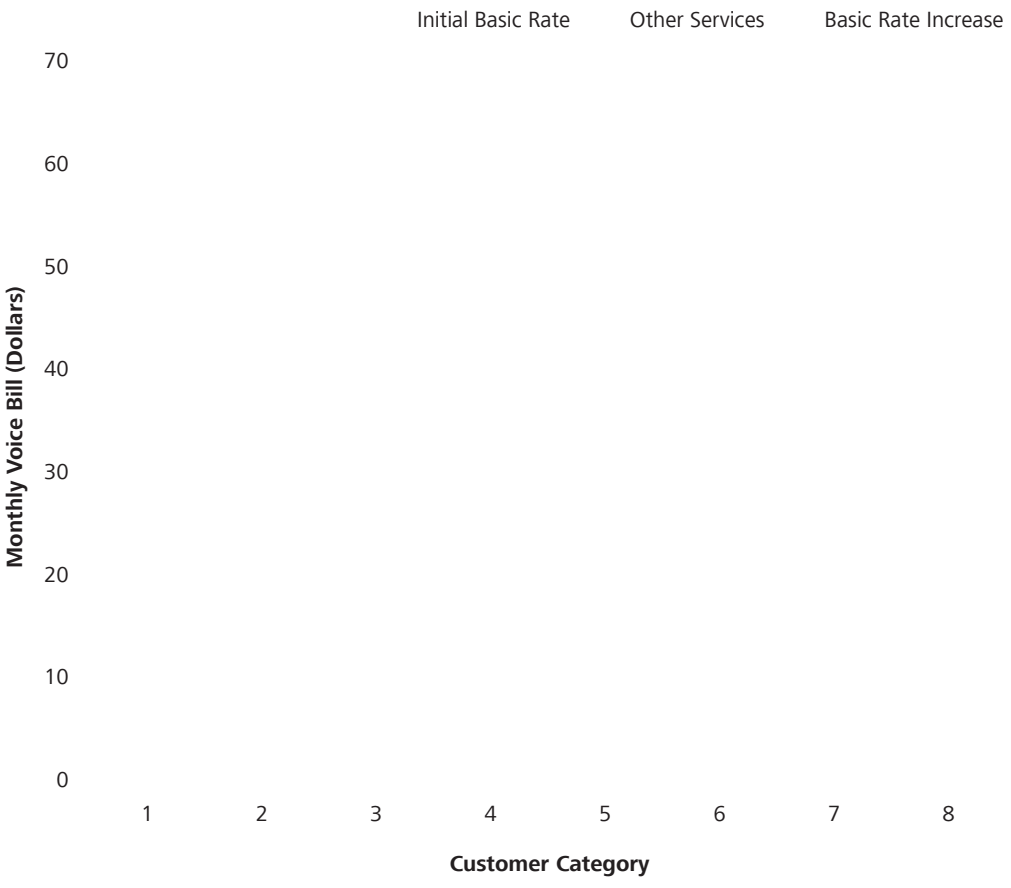
* Wireless plans include: voice mail, call waiting, caller ID, and other features. Two hundred- to four hundred-minute plans include unlimited nights and weekends. Charges for upgrading existing plans are incremental charges for adding sufficient usage to replace average landline usage. Landline average flat rate from FCC, *Reference Book of Rates, Price Indices, and Household Expenditures for Telephone Service*, 2007, at iv, and Table 1.1.; synthetic bundle charges are NERA estimates (See Harold Ware, "Can Competition Regulate Rates for Basic Telephone Services?" presented at the International Telecommunications Society Conference, Montreal, Canada, June 2008.). Wireless charges from provider websites accessed mid-2007.

[5] About 40% of residential landline customers buy á la carte voice services, and about 75% of these buy a "synthetic package" of local, toll service, and possibly vertical features from á la carte voice offerings. The average charge for flat rate local service is $21 per line per month and the average long distance bill is $11 per line per month. Adding $4 per month for optional local services like call waiting brings the total to $36.

Fourth, as illustrated in Figure 2 below, competition for synthetic bundles regulates prices for basic service even for those few customers who do not subscribe to other services. Figure 2 shows the monthly expenditure of customers who purchase synthetic bundles, ranging from Customer 1, who purchases access only, to Customer 8, who purchases access and many other services. A $2 increase in the basic rate increases synthetic package charges for Customer Types 2-8—including those for whom packages provide vigorous competition.

- An increase in basic rates increases the charges for synthetic packages, as well as the price for standalone basic service.
- The potential loss of the more lucrative (and more numerous) synthetic package customers deters basic rate increases because ILECs charge the same price to all customers who buy basic services.
- Even if Customer 1 faces limited competitive choices, the fact that Customer Types 3-8 have many choices and there are many such customers means that customers who spend less—including Customer 1—are protected from supracompetitive price increases.

**Figure 2: Competitive Packages Protect Customers Who Only Purchase Basic Service**



Fifth, changes in price and demand from 2001 through 2007 imply that wireless is a substitute for wireline service rather than a complement. Ask yourself what would happen (all else equal) if landline prices rose relative to wireless prices (or if wireless prices declined relative to landline prices): would demand for wireless service increase or decrease? The only reasonable question on the table is by how much would wireless demand increase?

- The price of wireless service relative to wireline service declined by about 12%.[6]
- From December 2001 to December 2007, the number of wireless-only households increased by about 18.4 million.[7] This dramatic wireless increase translates into a loss of 20.3 million landline access lines, assuming an average wireless-only household would have purchased 1.1 landline access lines. Adjusting for the number of newly formed households that never subscribed to landline service, we estimate that about 18.6 million landline access lines were replaced by wireless connections. (Total landline residential lines actually declined by about 30 million. However, we confine this analysis to shifts from landline to wireless connections.) The reduction of 18.6 million residential wired lines represents a change of about 16.5% of the average number of residential lines over the period at issue.
- The percentage reduction in wireline demand associated with gains in wireless-only households divided by the percentage reduction in the relative price of wireless to wireline services implies a cross-price elasticity of about 1.4. Calculating the elasticity based on the percentage change in relative price is a way to control for the increase in wireline service prices over the period.[8] We would have preferred to estimate price elasticity from the coefficients of a demand function that controls for other factors such as changes in taste and income. However, our calculation strongly suggests that wireless is a good substitute for landline.

Sixth, our analysis shows that wireless is at least as potent of a competitor as cable telephone service. In contrast, the DOJ found that cable telephone is a significant competitor to LECs, but that wireless competed mainly for usage and second lines. As shown in Figure 3 below, we estimate that residential cable telephone lines and the number of wireline access lines displaced by wireless-only households grew from about 9 million at the end of 2003 to 38.1 million at the end of 2007, and *most of the landline losses were to wireless.*[9]

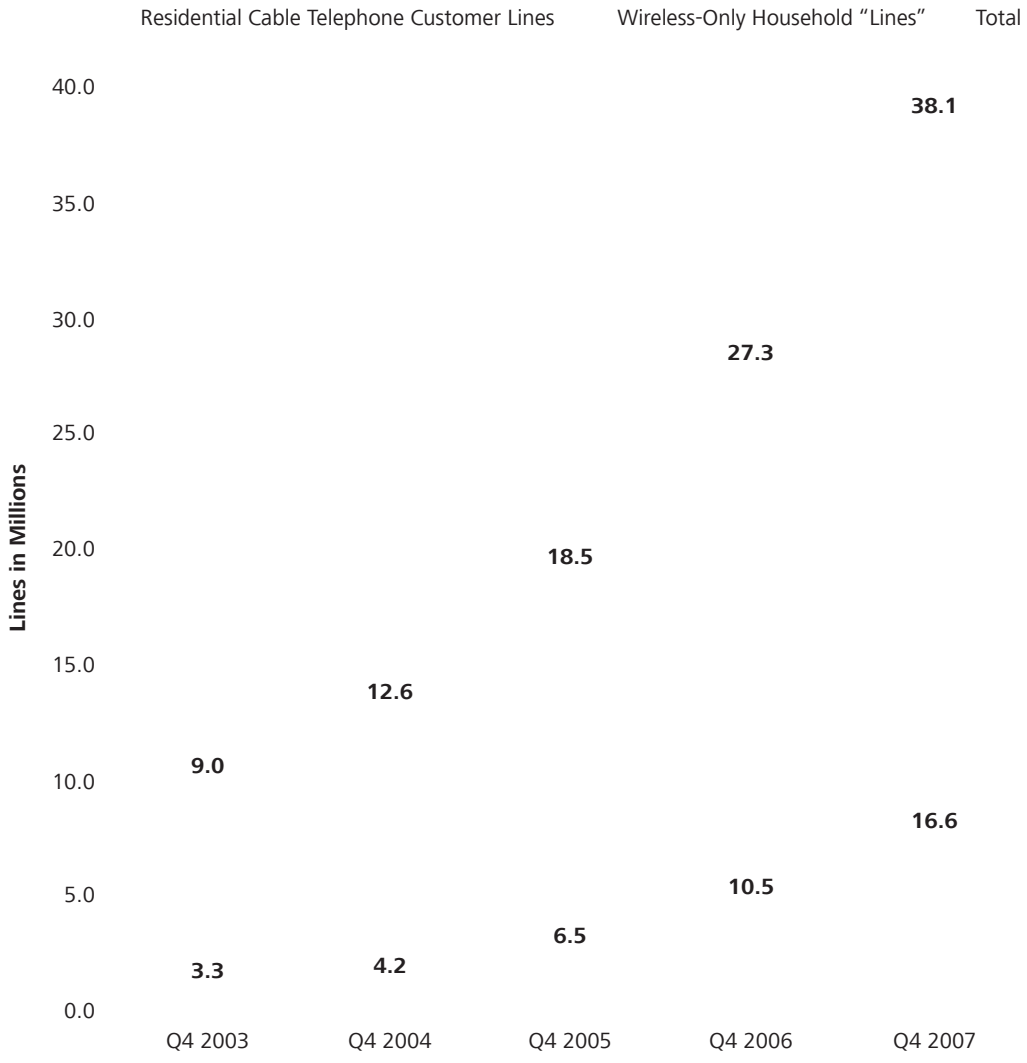
[6] We use the average price over the interval for the denominator of this percentage change because price elasticity is estimated as (change in quantity as a percentage of average of the initial and ending quantity demanded)/(change in price as a percentage of the average of the initial and ending prices).

[7] The increase in wireless-only households is the difference between 1.2 million wireless-only households reported by the FCC for year-end 2001 (*FCC Trends in Telephone Service*, February 2007, Table 7.4) and our estimate of 19.6 million wireless-only households for year-end 2007. Our estimate is based on the NHIS data summarized in Figure 3 below and Census Bureau household counts.

[8] According to US Census data, about 1.4 million households per year were added on average from 2001 to 2007. Based on available (2003 to 2007) NHIS data, we estimate that about 20% of these households (i.e., the average percent of "wireless-only" 18-29 year old adults) decided not to install a landline phone. This implies that only about 290,000 new wireless-only households per year have never purchased a landline. However, over that same period the number of wireless-only households grew by about 3.6 million per year. Thus, we estimate that about 92% of the 3.6 million per year gain in wireless-only households literally replaced their landline service with mobile wireless service.

[9] This estimate is based on the number of wireless-only households plus the number of residential cable telephone customers times 1.1—i.e., it is equivalent to assuming that one in 10 of these customers had a second line/phone.

**Figure 3: Growth of Wireless-Only Households and Residential Cable Telephone Lines**[10]




[10] Stephen J. Blumberg, PhD, and Julian V. Luke, "Wireless Substitution: Early Release of Estimates from the National Health Interview Survey, July – December 2007," Division of Health Interview Statistics, National Center for Health Statistics. National Cable Television Association, "Cable Voice/Phone Customers 2001-2007." http://www.ncta.com/ContentView.aspx?contentId=61 (the NCTA identified the predecessor of this figure as "Residential Telephony Customers: 2001 to 2006").

Seventh, in our view the DOJ reached several other erroneous conclusions about trends in voice service:

- The DOJ refers to "…a decline in the number of residential landlines, primarily as a result of consumers discontinuing second lines, and entry by cable firms."[11] However, the FCC *Trends in Telephone Service* data for 2001 through 2006, on which they rely, notes that "non-primary" or second lines were estimated using a different source in 2002 than in 2001. Thus, it may be more appropriate to look at trends from 2002 forward.
- We estimate that from 2002 to 2007, most (20 million of the 28 million) residential lines lost were from primary lines.[12]
- And as we describe in detail above, gains in wireless-only households account for more of these losses than cable telephone does. This is the case even though cable had a much larger impact than suggested by the FCC data cited by the DOJ. Based on the December 2007 *FCC Local Competition Report* data, the DOJ states that "up to 8.4 million" residential lines were provided over coaxial cable.[13] However, the December 2007 cable industry data we cite above show that that there were almost 16.6 million residential cable telephone lines at that time.

Finally, the DOJ's conclusion (that "the available evidence does not establish that mobile services currently represent an effective competitive constraint on landline access pricing"[14]) suffers from the classical fallacy of composition. While the *DOJ Report* asserts that substitution to wireless, *by itself*, may be too small to constrain wireline prices, that claim is irrelevant to any policy discussion. The evidence clearly shows that for some (perhaps many) customers, an increase in wireline prices will cause them to shift to wireless services exclusively. Thus, any competitive analysis of wireline access service must take wireless services into account—as wireline carriers obviously do—together with cable and VoIP competitors.

[11] See *DOJ Report* at 12, and Executive Summary at i.

[12] Table 7.4 of the most recent FCC Trends in Telephone Service shows a loss of 7.9 million residential "non-primary" lines from 2002 to 2006. To extend the data through 2007, we used the percentage change in non-primary lines from the FCC ARMIS reports from 2006 to 2007.

[13] See the DOJ Report at 15.

[14] Id. at 88.

## About NERA

NERA Economic Consulting (**www.nera.com**) is an international firm of economists who understand how markets work. We provide economic analysis and advice to corporations, governments, law firms, regulatory agencies, trade associations, and international agencies. Our global team of more than 600 professionals operates in over 20 offices across North America, Europe, and Asia Pacific.

NERA provides practical economic advice related to highly complex business and legal issues arising from competition, regulation, public policy, strategy, finance, and litigation. Founded in 1961 as National Economic Research Associates, our more than 45 years of experience creating strategies, studies, reports, expert testimony, and policy recommendations reflects our specialization in industrial and financial economics. Because of our commitment to deliver unbiased findings, we are widely recognized for our independence. Our clients come to us expecting integrity and the unvarnished truth.

## Contact

For further information contact:

**Dr. Harold Ware**
Vice President
White Plains, NY
+1 914 448 4160
harold.ware@nera.com

Attachment C

The New York Times



**April 30, 2009**

# Talk Is Cheap, if You Ask

**By ERIC A. TAUB**

LIKE many Americans, you moved into your home or apartment, you set up your phone service, and then you forgot about it.

And like many Americans, you're probably paying too much. A long-distance telephone call that cost 25 cents a minute in the 1980s can now be had for fractions of a penny.

The price of traditional telephone service has plummeted, but have your bills?

When it comes to lowering phone costs, it's up to you to do the heavy lifting. To keep customers from deserting their landlines, the traditional phone companies like AT&T and Verizon offer a slew of discounts, but nobody is giving them out unless you ask.

With most people owning cellphones, landlines might seem superfluous, but for many the idea of using only a cellphone is unappealing. While cellphones give you a bucket of minutes for one flat fee, spotty or nonexistent indoor service means that you may not want to cut the landline.

If you're one of the millions who wants to keep traditional landline service, ask yourself a few questions.

Do you really need that dedicated fax line that's been receiving nothing but unwanted ads for years? Is that discount long-distance service that you bought at the turn of the 21st century still the best deal in town? With a little searching (and using the tips mentioned here) you can save hundreds of dollars on traditional landline phone service every year.

Bundle Up

Phone companies will discount your rates if you order more than just landline service. Combine it with DSL, cell and television, and you can save hundreds of dollars a year.

Combine just your cellular and landline bills at AT&T and the company will knock $5 off your monthly bill.

When the old AT&T was broken up, consumers were free to choose a separate long-distance carrier. Many independent companies sprang up that offered much lower long-distance rates.

But those days are past. Now both AT&T and Verizon offer flat rate plans; for around $40 a month, you can receive unlimited local and long distance calling. Supplemental services, like voice mail, caller ID, call waiting and distinctive ring tones, once sold only on an à la carte basis, are now bundled in ever-larger packages.

Seek Alternatives

By using the Internet system to carry calls rather than the traditional phone lines, voice-over-Internet-protocol (VoIP) companies can offer even cheaper phone service with a wider range of supplemental features.

The least expensive VoIP services work only when your computer is on. Users of the online phone service Skype can call other Skype users around the world free, and pay a nominal amount (around 2 cents a minute) to make calls to other, non-Skype phones. Callers use either a headset connected to their PC or a Skype-enabled handset.

If you want to use your existing phone, connect it to magicJack, a $40 U.S.B. computer dongle that works with PCs and Intel-powered Macs to provide free calls over the Internet. The purchase price includes one year of free unlimited calls within the United States and Canada; after that, it costs $20 a year. The company reserves the right to terminate for excessive usage.

In tests of both services, Skype's quality was spotty, with occasional voice delays and muffled sound. MagicJack's connection did not always work, and required me to restart the computer or replug the dongle. Because both magicJack and Skype work only when your computer is on, they are poor substitutes for traditional landline service.

Better alternatives are VoIP services that allow you to use your existing telephones. To activate the service, you connect the phone to the company's hardware, which in turn is connected to your broadband modem. The phone service works even when your PC is off.

Vonage, the best known VoIP service, offers unlimited domestic calling, plus free calls to five

European countries, for $25 a month. The necessary Vonage hardware, called a V-Portal, costs $80, but the company gives a $70 rebate for a one-year service commitment.

Ooma, a similar VoIP service, charges a one-time $250 fee for its hardware, with no monthly charge. All domestic calls are free. International calls to Western Europe and Canada are around 2 cents a minute.

To hook up additional phones to Ooma, you use a smaller “Scout” unit; one is included in the box, each additional Scout costs $60.

Ooma also offers a Premier service; for $13 a month or $99 a year, you’ll receive a second line plus enhanced features like call screening, the ability to set up phone number blacklists, and the conversion of voice mail to e-mail.

When it comes to setup, ease of use, and call quality, both companies have done their homework. The interface boxes are attractive, the instructions are well-written and intuitively designed. Both systems worked flawlessly after the first installation attempt. And both provide excellent voice quality.

Before you switch, consider the downsides: since VoIP services need a robust Internet connection, you’ll still need to buy broadband, which could cost more if you buy it separately than if you bundle it with a landline phone plan.

If your broadband service goes down or if you have a power outage, your phone service will also stop working. That’s not the case with traditional landline services (if you use a traditional corded phone that does not need power).

Make an End Run

When long distance was expensive, cheaper dial-around services — where you first dial an 800-number or special code to get into the system — made sense. Today, you can often get lower long-distance prices directly from the service provider you choose.

One exception is international calls, where a number of low-cost international calling plans are available that easily beat the prices charged by AT&T and Verizon.

AT&T charges a $5 monthly fee simply for the right to receive reduced international rates. AT&T discounted rates are still higher than many of its competitors: 9 cents a minute to France, 36 cents to South Africa, and 8 cents a minute to Britain.

By using a dial-around service like Pingo, you can reduce the monthly fee to $1 and cut rates to 2.2 cents a minute to France, 6.9 cents to South Africa, and 1.8 cents to Britain.

Another service, TotalCall, offers higher rates but no monthly fee, as long as you spend at least $15 a month in international charges. Calls to France cost 6.9 cents a minute, 14.4 cents to South Africa, and 7.2 cents to Britain.

In all cases, calls to cellphones abroad cost more. But one advantage to the dial-around plans: you can use your cellphone to call overseas and still get the same low rates that you do at home.